United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7340

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

EDMOND PFOTZER AND
E. JOHN PFOTZER, ET ETC.
Plaintiffs-Appellants

v.

AMERCOAT CORPORATION AND AMERON, INC.
Defendants-Appellees.

U. S. District Court, District of Connecticut,
Civil No. B-947

U. S. Circuit Court of Appeals, Second Circuit,
Civil No. 76-7340

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF DEFENDANTS-APPELLEES

Kevin J. Maher
Attorney for
Defendants-Appellees

Adrian W. Maher
On The Brief

Maher and Maher
955 Main Street
Bridgeport, Connecticut 06604

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CITATIONS

ISSUE PRESENTED FOR REVIEW

Does a Voluntary Dismissal with prejudice under Rule 41(a) of the Federal Rules of Civil Procedure operate as a final adjudication of the issues presented?

NATURE OF THE PROCEEDINGS

The instant controversy can trace its origin to a state court proceeding wherein the status of the parties are reversed, but the holdings of the state court are consistent with the rulings of the United States District Court for the District of Connecticut. The evolution of this action arises from a contractual obligation between the plaintiffs, Edmond Pfotzer and E. John Pfotzer, Co-Partners trading as E. and E. J. Pfotzer, as general contractors, and the City of Norwalk, not a party to this case. Briefly, Pfotzer entered into an obligation with the City of Norwalk to construct a sewage treatment plant. In the course of this construction certain manufacturers supplied articles of equipment to Pfotzer, one such supplier being the instant defendant. Inasmuch as Pfotzer failed and neglected to pay for the cost of the goods sold, the defendant instituted an action for collection in the Superior Court for Fairfield County at Stamford, naming as defendant the Pfotzers and the TransAmerican Insurance Company, which concern had issued a labor and material bond on behalf of the Pfotzers. Numerous pleadings, such as third-party complaints, cross-complaints and counterclaims were filed by the parties over the several years of this litigation. At one time the status of the pleadings took the following form: The original action founded upon an open account, a third-party complaint instituted by Pfotzer against the City of Norwalk for indemnification against the original action, a counterclaim by the City of Norwalk against Pfotzer for an element of the original contractual relationship between those parties and a cross-complaint against Amercoat, the original plaintiff by the City of Norwalk for further indemnification.

This historical background of the litigiousness of the parties is, we believe, necessary to fully define the narrow issues presently being presented to the Court of

Appeals. In May, 1973 or June, 1973, Pfotzer attempted to file a counterclaim against Amercoat based on two separate theories of law, i.e., breach of warranty and fraud. Upon presentation to the Court at a Short Calendar day, the Court, Tunick, J., denied the motion to amend to assert a counterclaim. Although Judge Tunick did not write a memorandum outlining his decision on this motion, it is logical to assume that his rationale was based on a finding that any purported counterclaim was barred by the applicable Statute of Limitations, noting that the original action was instituted in September, 1969, and that all pleadings had been closed for some applicable period of time prior to the motion for permission to amend to assert a counterclaim.

Subsequent to the state court ruling, Pfotzer instituted the instant action which is a verbatim repetition of the denied counterclaim in the Superior Court, in both the United States District Court for the District of Connecticut, and the United States District Court for the District of Delaware. Numerous interlocutory motions were filed by the defendants contesting the jurisdiction, all of which motions, both in Connecticut and Delaware, were decided adversely against Amercoat.

During the period of time that the parties were at issue in the applicable District Courts, events in the State court litigation reached actual trial status. The Superior Court, with the apparent acquiescence of all the parties, referred the actual trial of the case to State Trial Referee Patrick B. O'Sullivan. On September 9, 1974, actual trial was to have commenced, but on said date, a purported agreement was reached by counsel for the parties which, to say the least, confused an already confusing situation.

The present appeal stems from the proper interpretation of the alleged stipulation and the conduct of the parties subsequent thereto acting in reliance upon the

alleged agreement. It is the contention of Pfotzer that a clear and unambiguous understanding was reached with counsel for Amercoat in the State Court action to the effect that in consideration of Pfotzer executing a Voluntary Dismissal with Prejudice in the United States District Court actions he would be allowed to file his counterclaim in the State Court even though permission to file this counterclaim had previously been denied to him by Tunick, J. On the other hand, the position of Amercoat is to the effect that certain conditions had to be met prior to the actual permission to file the purported counterclaim, the most important condition being an actual consent to file being annexed and properly endorsed by all parties and/or counsel. To this end, no actual consent was filed, inasmuch as the parties could not agree among themselves as to the actual meaning of the stipulation before State Trial Referee O'Sullivan.

Nonetheless, the plaintiffs, even though fully cognizant of the disagreement of all parties as to the consent, voluntarily executed a Stipulation for Dismissal which was filed and approved by the United States District Court for the District of Connecticut on November 13, 1974.

Recent developments, however, in the State Court proceedings have not gone entirely to the satisfaction of Pfotzer, and, therefore, Pfotzer has now attempted to vacate the Stipulation for Dismissal. All the State Court proceedings against Pfotzer have been withdrawn by all parties, leaving only an indemnification action of Pfotzer against the City of Norwalk, which the Court, Dean, J., ruled as "moot" and, therefore, dismissed the case. On Appeal the Supreme Court of Connecticut on October 26, 1976, dismissed this Appeal of the instant plaintiffs. It should further be pointed out to the Court that Mr. Pfotzer is following the same procedures in the appropriate Court of Appeals in Delaware as he is following in the instant case, i.e., Reopen a Voluntary Agreement with prejudice.

ARGUMENT

Basically, the crux of this entire appeal is that plaintiffs do not agree with the state court determinations and, therefore, are trying to reinvoke the Federal Court jurisdiction by attempting to repudiate a stipulation for dismissal with prejudice executed by them. This is to say the least a novel and ingenuous approach to this problem, but one which is contrary to applicable law.

In order to allow a plaintiff the discretionary right to remove his case from court, if no other party would be prejudiced, Rule 41 of the Federal Rules of Civil Procedure has been promulgated, which states:

"(a) Voluntary Dismissal; Effect Thereof.

(1) By Plaintiff; by Stipulation Subject to the Provisions of Rule 23(e), of Rule 66 and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation for dismissal signed by all parties who have appeared in court. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems

> proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

The election of remedies available to a plaintiff, i.e., the unilateral act of withdrawing his proceeding prior to service of an answer or of a motion for summary judgment, or the dismissal with consent of all parties who have appeared in court or the dismissal by order of court after motion and upon whatever conditions and terms which may be imposed all specifically state that a voluntary dismissal shall be without prejudice to the prosecution of another action unless specifically stated to the contrary.

The question which therefore is posed to the court for its determination in the instant case is what effect must be given to a voluntary dismissal with prejudice when the same has been executed by all parties who have appeared in court.

In **Hudson Engineering Company v. Bingham Pump Company**, 298 F. Supp. 387 (1969) the Court, in holding that a dismissal with prejudice has the effect of a final adjudication on the merits and was thus a bar to future suits brought by the plaintiff upon the same cause of action, stated

> "It must be remembered that the purpose of Rule 41 (a) was to eliminate the evils resulting from the unqualified right of a plaintiff to take a voluntary nonsuit at any stage of the proceeding before the pronouncement of the judgment and after the

defendant had incurred substantial expense or acquired substantial rights."

In **1B Moore's Federal Practice** Sec. 0.409, the author, in commenting upon the effect of a voluntary dismissal with prejudice, has stated, at page 1008, that:

"Where, at any stage of the proceedings, there is for any reason a dismissal of the suit with prejudice, the dismissal normally amounts to a final judgment on the merits and bars a later suit on the same cause of action."

This rule that a stipulation for dismissal with prejudice, or for that matter a dismissal with prejudice at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action, was reiterated in **Astron Industrial Associates, Inc. v. Chrysler Motor Corp.**, 405 F. 2d 958 (1968).

In **Glick v. Ballintine Produce, Inc.**, 397 F.2d 590, it was held that a dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and bars further action between the parties. It was further held that the law of res judicata as it relates to claim preclusion is firmly established. In a subsequent action by the same parties, a judgment on the merits in a former action based upon the same cause of action precludes relief on the grounds of res judicata. The judgment is conclusive, not only as to matters which were decided but also as to all matters which might have been decided.

In **Cleveland v. Higgins**, 148 F.2d 722 (1945) the Second Circuit, in deciding an action wherein the first action had been dismissed with prejudice by stipulation of the parties and thereafter a second suit was brought for a

claim for refund, held

> "The decision in the first suit was res judicata, for a dismissal with prejudice is a final judgment on the merits which will bar a second suit between the same parties for the same cause of action."

See also **Smoot v. Fox**, 340 F.2d 301 (1964) for a holding that a dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties. An adjudication in favor of the defendants, by court or jury, can rise no higher than this.

In applying the rationale of the above cited decisions, no other conclusion can be reached except that the instant case falls directly within the meaning of these decisions. The plaintiffs, although pro se, executed a stipulation for dismissal with prejudice, which stipulation was approved by the court, Newman, U.S.D.J. This agreement having been voluntarily entered into by the plaintiffs now is the subject of the instant appeal on the basis that it was entered into by fraud and/or is void for lack of consideration.

Plaintiffs claim that because of a failure to reach understanding in a purported agreement entered into by all parties in a state court action the stipulation for dismissal with prejudice is a nullity. In other words, having allegedly reached an agreement in a state court action, which contained conditions subsequent, the plaintiffs executed the instant dismissal with prejudice. When the purported agreement in the state court action became non-existent, the plaintiffs now complain that they never meant to enter into a dismissal with prejudice.

The instant plaintiffs, although pro se, are no strangers to the Federal Rules of Civil Procedure and/or the

applicable Practice Book Pleadings contained in the Connecticut Practice Book. These gentlemen since 1969 have been immersed in various litigation both in the Federal system and the state court. They were well aware that the document that they executed, i.e., a Stipulation of Dismissal was a full and final adjudication of their rights, whatever they may be, in the United States District Court for the District of Connecticut.

Since this appeal was taken, the plaintiffs have also taken an appeal from the decision of Dean, J., in the Superior Court for Fairfield County at Stamford. On October 26, 1976, in Vol. XXXVIII No. 17 **Connecticut Law Journal**, the appeal of the instant plaintiffs was dismissed by the Connecticut Supreme Court.

CONCLUSION

For the foregoing reasons, the defendants, Amercoat Corporation and Ameron, Inc., respectfully request that the decision of the United States District Court, Newman, U.S.D.J., be affirmed, and the appeal of the plaintiffs be dismissed.

Respectfully submitted,

The Defendants
Amercoat Corporation
and Ameron, Inc.

By Kevin J. Maher
For Maher and Maher
Their Attorneys
955 Main Street
Bridgeport, Connecticut

UNITED STATES COURT OF APPEALS

FOR THE SECOND DISTRICT

EDMOND PFOTZER, ETC., ET ANO,	:	
Plaintiffs-Appellants,	:	
vs.	:	DOCKET NO. 76-7340
AMERCOAT CORPORATION and AMERON, INC., ETC.	:	
Defendants-Appellee	:	AFFIDAVIT COVERING PROOF OF SERVICE
(D. C. Civil Action No. B-947)	:	

STATE OF CONNECTICUT)
: ss. Bridgeport November 12, 1976.
COUNTY OF FAIRFIELD)

I, KEVIN J. MAHER, representing the interest of the defendants-appellees, Amercoat Corporation and Ameron, Inc., make this affidavit in connection with the following proof of service:

I certify that on November 12, 1976, I forwarded two copies of Brief of Defendants-Appellees via United States mail, postage prepaid - Certified Mail-Return Receipt Requested to:

Mr. Edmond Pfotzer
E. & E. J. Pfotzer
Post Office Box 987
Wilmington, Delaware 19899.

Kevin J. Maher

Subscribed and sworn to before me, this 12th day of November, A. D., 1976.

C David Minnick
Commissioner of the Superior Court for Fairfield County

MAHER & MAHER
ATTORNEYS AT LAW
955 MAIN STREET
BRIDGEPORT, CONN. 06604

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MAHER & MAHER
ATTORNEYS AT LAW
955 MAIN STREET
BRIDGEPORT, CONN. 06604

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